SUPREME COURT, U.S.

No. 680

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE DELAWARE AND HUDSON RAILROAD CORPORATION,

Appellant,

against

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

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January 6, 1967

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REPLY BRIEF FOR THE APPELLANT

This Reply Brief is submitted in response to the various briefs of appellees herein and in Appeals Nos. 642, 691, 813, 814 and 815.* We shall of course not attempt herein to restate our contentions set forth at length in our opening Brief, although it will be necessary to summarize some of them in order to make a clear answer to various assertions made by appellees. On the other hand, this reply should not be assumed to be our answer to every contention of the appellees' with which we disagree; rather, we refer to our opening Brief on matters which we do not choose to cover here.

* Abbreviations of various railroad companies used herein, and references, unless otherwise stated, including references to the opinions of the District Court and the Commission's September 16, 1966 Report and Order which are set forth in appendices A and B, respectively, to the Jurisdictional Statement in No. 642, conform to those used in D&H's opening Brief.

I

APPELLEES' BRIEFS SHOW NO JUSTIFICATION FOR THE CONCLUSION THAT CONSUMMATION OF MERGER IS CONSISTENT WITH THE PUBLIC INTEREST PRIOR TO DETERMINATION OF ESSENTIAL CONDITIONS FOR PROTECTION OF D&H, EL AND B&M PENDING INCLUSION IN A MAJOR SYSTEM

As set forth in its opening Brief (pp. 23-30), D&H contends that the Commission's action in its Report of September 16, 1966 permitting consummation of the merger without determining the conditions which it itself found in its Report of April 6, 1966 to be essential to undelayed consummation of the merger was unlawful, in that the Commission failed to complete the job of imposing conditions necessary to make consummation of the merger "consistent with the public interest" as Section 5(2) of the Interstate Commerce Act requires. The unlawfulness of authorizing immediate consummation is highlighted by the rescission of the revenue indemnity provision originally prescribed by the April 6 Report.

In attempting to answer this contention, the Penn and Central Brief (p. 56) clearly misconstrues the Commission's April 6 Report. That Brief says:

> "The Commission did not there hold that the public interest would not permit prompt consummation of the merger except with the prior adoption of the particular protective conditions there promulgated."

The fact is the Commission did so hold, and in virtually the identical words used in the Penn and Central Brief. After finding that it would not authorize consummation of the

merger, even though approving the merger, without special protection for D&H, EL and B&M, the Commission made this critical finding:

> "Our approval of the merger for *undelayed* consummation *shall* be subject, therefore, to *the conditions specifically described in appendix G.*" (327 I.C.C. 475, 532) (Emphasis added)

This finding—that approval of undelayed consummation shall be subject to the originally prescribed Appendix G conditions—has not been discussed in any of the briefs filed by appellees. Their deliberate ignoring of this basic finding in the case is as significant as the finding itself.

Having first established conditions which it concluded would protect D&H, EL and B&M, it then decided to permit undelayed consummation of the merger without its being subject to a principal condition specifically described in Appendix G, i.e. the provision for indemnity. Significantly, there is nothing to indicate a change of mind as to the need for protection or as to the need for indemnity to provide such protection. See Judge Weinfeld, dissenting below (A—40). Judge Weinfeld in commenting about this situation in the related case of *Oscar Gruss & Son* v. *United States*, 66 Civ. 3413 (S.D. N.Y. 1966), printed as Appendix A to the New Haven's Brief, further stated:

> "In *Erie*, on the other hand, the terms and conditions left for future determination had, in my opinion, a vital bearing upon the public interest. Those terms, according to the Commission, were essential for the protection of the smaller carriers, the shippers, passengers and the communities they serve. By revoking them without adequate findings to support the change of position, the Commission undermined its own finding that the merger was

consistent with the public interest only if the safeguards were provided; by its action it brought into question the validity of its order authorizing immediate consummation of the merger. By leaving for further consideration the terms and conditions it previously held essential to consummation, it exposed the three carriers during the period the matter would be under consideration to the same adverse factors it found militated against the merger, absent adequate protective terms. In that circumstance I questioned the power of the Commission under section 5(2)(b) of the Act to defer until after consummation the determination of terms, 'found essential to validate this merger.' "

Penn and Central say in their Brief (p. 57), that the reason the Commission changed its mind as to the Appendix G provisions was that "the three protected carriers" had raised "valid issues" with respect thereto. It is true that the Commission said this in connection with its statement that "modifications of Appendix G may be desirable" (B—41); but it cannot be the reason for rescission of the indemnity. It is clear that what the protected carriers sought was clarification and strengthening, not lessening, of the protection. If it had been just a matter of the contentions of the three protected lines, the indemnity provision would have been allowed to stand, subject to possible retroactive modification, rather than rescinded, subject to possible retroactive reinstatement.

Why, then, the complete rescission of the indemnity provision? The Commission gave no reason directly. However, it seems, in view of the second issue set for further hearing (B—42), that the Commission had developed doubts as to whether it could provide, consistently with the public interest, protection by indemnity in the light of the contentions raised by the so-called "unprotected carriers".

To permit undelayed consummation of the merger while such a fundamental question remains unresolved as to the conditions which the Commission had found prerequisite to undelayed consummation, is, we submit, clearly error in the administrative process. In any event, as Judge Weinfeld, quoted above, said, by revoking the indemnity "without adequate findings to support the change of position, the Commission undermined its own finding that the merger is as consistent with the public interest".

The appellees in general (Penn and Central Brief, pp. 38, 40 n.19; Commission Brief, pp. 66-67; NH Brief, p. 36; State of New York Brief, pp. 22-23) seek to justify this remarkable result by saying that the Commission will necessarily either resolve its doubts favorably as to the original protective devices or find some other satisfactory solution.* Indeed, they go even further and say that the Commission necessarily determined that it can provide adequate protection when it authorized the merger to proceed even before it held hearing on the conditions. This, we submit, the Commission cannot properly have done, for it could not know in advance of hearing what all the evidence would be.

While D&H may hope that the Commission will arrive at a satisfactory protective arrangement, the point is that no such arrangement is presently in effect as the Commission's own findings in its April 6 Report require; and until it is, the Commission cannot properly conclude, in view of its own finding as to the necessity for such protection, that undelayed consummation of the merger is lawful, i.e. that the merger has been subjected to "just and reasonable" condi-

* While the Penn and Central Brief (p. 38) suggests the Commission may "formulate a mode of financial indemnification basically different from that originally promulgated", it is of interest to note that neither the Penn nor Central witnesses at the recent further hearings before the Commission on this matter even offered for consideration a "basically different" method.

tions required to make the merger "consistent with the public interest" as Section 5(2) of the Act demands. Appellees, in concluding that the Commission can and, indeed, will find satisfactory protective conditions after consummation prejudge the Commission's determination on the issues involved in the further hearings on the conditions.

As the majority opinion below itself pointed out in another connection, the commission has a "duty to avoid prejudgment." (A—10 n.4)

In this connection we note that Penn and Central state (Brief, p. 43) that D&H disclaims the argument that it is likely the Commission will find that it cannot fix adequate protective conditions. D&H neither claims nor disclaims that the Commission is likely or unlikely to provide adequate protection. To do so is to speculate idly upon a result yet to be reached in a case not yet submitted to the Commission for decision.* This Court should not be required to speculate about the meaning of decisions already reached by administrative agencies. Cf., *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196-97 (1947). Surely there is no advantage to be served by speculating as to future ones. The point, and, we submit, the only point of relevance to this Court in this respect at this time, is that, since the matter has not yet been resolved, the possibility exists that it will be finally determined that provisions cannot be found which will adequately protect D&H, EL or B&M, short of their inclusion in a major system. So long as this possibility exists, the Commission, by its own findings as to the necessity for such protection pending inclusion, cannot lawfully authorize "undelayed consummation" of the merger.

Certain appellees construe the indemnity provision as mere "insurance" or a "backstop" for the traffic condi-

* While hearings have been held, the briefing process will not be completed until February 6, 1967.

tions in an effort, it seems, to suggest that the indemnity lacks essentiality (e.g. Penn and Central Brief, p. 41 n.20; State of New York Brief, p. 16). The fact is, however, that the Commission has never so indicated in its Report—rather it has continually coupled the traffic restrictions and the indemnity together as a single bundle of conditions which it has considered necessary to protect the interests of D&H, EL and B&M, without in any way indicating that either is to be considered of primary importance.*

The Penn and Central Brief (pp. 21-22) attempts to justify the action of the Commission in leaving to later solution "collateral and contingent problems" as consistent with the Commission's decisions in the two earlier major Eastern rail merger cases, C&O-B&O** and N&W-Nickel Plate.***

In fact, however, in neither of those cases did the Commission make any findings that other carriers would be substantially adversely affected by the formation of the

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* See D&H opening Brief (p. 31). Compare the recent description of the protective conditions by Commissioner Webb in his Recommended Report (p. 25) in the D&H, EL, B&M inclusion proceedings in Finance Docket No. 21510, released December 22, 1966: "The temporary traffic *and* indemnity conditions under consideration [in Penn-Central] relate essentially to maintenance of the *status quo* pending final determination of the petitions for inclusion. . . ." [Emphasis added]

If one were inclined to speculate as to which of the two were considered by the Commission the more important or more efficacious one could just as easily conclude, in view of the obvious limitations on the effectiveness of the traffic conditions (see D&H Brief, pp. 31-42), that the indemnity was regarded as of chief importance and that the traffic conditions were imposed merely to provide some lessening effect on the monetary payments Penn-Central would otherwise have to make. This view of the relative importance of the original protective conditions appears to be supported by the City of Philadelphia (Brief, p. 9).

** *Chesapeake & O. Ry.—Control—Baltimore & O. R.R.*, 317 I.C.C. 261 (1962), aff'd *sub nom. Brotherhood of Maintenance of Way Employees* v. *United States*, 375 U.S. 216 (1963).

*** *Norfolk & W. Ry. and New York, C. & St. L. R.R.—Merger*, 324 I.C.C. 1 (1964).

systems there involved. Neither, therefore, required the Commission, when it chose not to delay consummation, to establish conditions which would be effective to prevent harm to other roads and their ability to continue to perform adequate service to the public. In Penn-Central, however, as the Commission itself found, it had either to establish such conditions or delay the merger until the adversely affected roads are included in a major system. It was thus both proper and natural, as well as necessary as a matter of law, for the Commission to specify, as it did in the finding above quoted, protective conditions which it deemed essential, before the merger went through—else why did not the Commission simply state in its April 6 Report that it would determine the conditions after merger?

In support of its position that the protective conditions may properly be deferred until after the merger is effectuated, the Penn and Central Brief (p. 28) refers to *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U. S. 378, 392 (1959). That case has no pertinence here. It involved no question as to withdrawal by the agency of an essential part of protection originally found necessary; nor any question as to the adequacy of the remaining conditions to provide protection.*

The Penn and Central Brief (pp. 27-28) and the Commission Brief (p. 58) refer to certain Commission cases**

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* For a discussion of other cases relied on in this connection in appellees' briefs, see D&H's main Brief (p. 26).

** *A. C. Allyn and Co. et al.—Control,* 50 M.C.C. 305, 310-11 (1948); *The Greyhound Corp.—Control,* 57 M.C.C. 123, 156-57 (1950); *The Greyhound Corp.—Merger,* 70 M.C.C. 59, 68-69 (1956); *Safeway Trails, Inc.—Control,* 70 M.C.C. 573, 577-78 (1957); *Baltimore Steam Packet Co. Acquisition and Control,* 244 I.C.C. 583 (1941); *Wabash R. R. Control,* 247 I.C.C. 365 (1941); *Chicago and Northwestern Ry. Merger,* 261 I.C.C. 672, 674-75 (1946); *Midwest Buslines, Inc.—Purchase—American Buslines, Inc.,* 80 M.C.C. 681 (1959).

involving its reservation of jurisdiction to impose subsequent protective conditions for employees as a condition to authorization of a transaction subject to section 5(2) of the Interstate Commerce Act. Such cases are relied upon by the appellees to show the Commission's consistency in the instant case when, in its September 16 Report and Order, it permitted undelayed consummation of the Penn-Central merger while reserving for future consideration the formulation of conditions for protection of D&H, EL and B&M. Such reliance is unwarranted. Every case cited explicitly states the absence of a showing of need for present protection of employees. Examples: "There is insufficient evidence in this record to warrant our imposing the specific conditions of [protection]...." *A. C. Allyn and Co., et al.—Control*, supra at 310; "[C]oncern as to the possible adverse affect upon [employees] ... seems unwarranted." *Safeway Trails, Inc.—Merger and Control*, supra at 576; "[I]t has not yet been determined whether the employment of employees ... is to be affected." *Baltimore Steam Packet Co.—Acquisition and Control*, supra at 605. The reservation of power by the Commission to impose subsequent protective conditions in those cases was merely to comply with the relevant provisions of section 5(2) and to provide for any adverse affect on employees which might later be shown. When such findings are contrasted with the findings in this case that the harm to D&H, EL and B&M is so evident and so extensive that the Commission would not permit the merger to be effectuated without inclusion of those roads in a major system, or at least without provision of interim protection pending their inclusion, the employee cases in fact furnish strong support for our position that the conditions required to furnish such protection here were regarded by the Commission in its April 6 Report as conditions precedent to the merger.

The Commission's Brief (pp. 57-58) makes the argument that because it may reserve for future determination the inclusion of other roads, *a fortiori* it may "exercise the lesser power" to reserve for future decision the interim protection for such other roads.

This contention is totally inapplicable here. It ignores the Commission's findings in this case both that "without inclusion in a major system", D&H "could not withstand the competition" of a merged Penn-Central and that prior to determination of its future interim protection was essential to "undelayed consummation". Where the Commission has made such findings, its reservation to consider possible future inclusion of the D&H actually argues *a fortiori* for the need to establish, *prior to merger,* that interim protection which is necessary to assure preservation of the protected road and its service before such inclusion is accomplished. The very fact that the more complete solution of subsequent inclusion, which is often more difficult and time consuming to achieve, is postponed is itself good reason for demanding that interim protection be determined prior to merger in cases where such findings are made.

The Commission Brief (pp. 61-62) purports to find no conceivable reply to the "logic" that if the power to reserve jurisdiction to reconsider conditions is conceded, then there must be power to postpone considering the conditions so long as the conditions ultimately determined upon are made retroactive to the date of merger.* The obvious

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* In this connection, the joint Brief (pp. 9-10) of the States of Connecticut, Massachusetts and Rhode Island charges that by conceding the power after merger to reconsider protective conditions established before merger, D&H is saying that the Commission could later change the conditions just so long as it had "gone through the motions" of imposing conditions prior to merger. Obviously the States' counsel have not read Section 5(9) of the Interstate Commerce Act (which D&H cited in its Brief as the basis for the "concession"). That section grants the Com-

reply is of course that so long as those conditions are not fixed there exists a possibility that it will be finally determined that no effective conditions can be fixed; and if that possibility should become reality, how can it be made, after merger, to jibe with the Commission's own finding that it would not have permitted the merger to go through in the first place without effective conditions?

The Commission, admitting it is possible that effective conditions may not be found and faced with the logic of its own illogic, is reduced to the argument (Brief, p. 70) that if effective conditions are not found, the merger can be undone, and if it is, the burden of dissolution will fall on Penn and Central, not on appellants. Of course, the very purpose of assuring that a merger is lawfully consummated before it is carried out is to avoid the extreme remedy of dissolution. *Breswick & Co.* v. *United States,* 134 F. Supp. 132, 141 (S.D. N.Y. 1955), rev'd on other grounds, *Alleghany Corp.* v. *Breswick & Co.,* 353 U.S. 151 (1957), discussed in *Stott* v. *United States,* 154 F. Supp. 389, 393 (S.D. N.Y. 1957); *Florida East Coast Ry.* v. *United States,* 228 F. Supp 340 (M. D. Fla. 1964). That "remedy", moreover, was properly found by both the majority and dissenting opinions below to be unrealistic here (A—35, 60). Further, while the burden of dissolution would fall on Penn and Central, the burden on D&H, EL and B&M of living—or, rather, trying to live with what would admittedly be inadequate protection—both during the substantial

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mission continuing jurisdiction to issue such supplemental orders *for good cause shown* as it may deem necessary or appropriate. The fact that changing circumstances or other good cause permits a change in conditions originally prescribed in no way lessens the necessity to establish adequate protection in the first place. And, as above stated, there has been no showing here that the need for protection, of which the indemnity, now withdrawn, provided an essential element, is in any way less or different than the Commission found in its April 6 Report.

period of time it would take before dissolution was finally determined and the further substantial period of time it would take to carry out the dissolution could be considerable and might well impair and perhaps destroy their viability.

Finally, if Penn-Central is effectuated and it abides by all the conditions imposed upon it, we wonder whether the Commission's subsequent failure to find satisfactory conditions for the protection of others would afford a proper basis for dissolution, at least without a clear provision in a Commission order expressly contemplating such an eventuality and its acceptance by the merging parties. We find no such provision in the Commission's Reports and Orders here.

II

INADEQUACY OF APPENDIX G TRAFFIC CONDITIONS TO PROVIDE ESSENTIAL PROTECTION FOR D&H IS CONFIRMED

We have shown in our opening Brief the inadequacies of the existing Appendix G traffic conditions in providing protection for D&H, and that in relying on such conditions as sufficient (A—28), the District Court committed error.

In so doing we took at face value the broad construction of those conditions which had been suggested in the Court below by the merging carriers. We find in the appellees' briefs no answers to the showing made by D&H as to the inadequacy of protection which the traffic conditions *even thus construed*, would furnish D&H.*

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* Such response as is made generally centers in a number of the appellees' briefs on the statement in the Commission's September 16 Report (B—14) that even without special conditions, the adverse effect of the merger would be felt "only gradually", and particularly the Commission's statement that "We see no basis for disagreeing with the testmony of the chairman of both E-L and

It should be noted that the majority below considered the Appendix G traffic conditions as broad and effective, describing them as "going far beyond anything in previous history"; stating that "a mere reading of their text is enough to belie any view that they would be ineffective"; and concluding that they would have a "highly beneficial effect" which would "sharply reduce" the loss of D&H (A—28-30). Certainly no one attached a broader meaning to them before the Court below than counsel for Penn and Central. In their first memorandum to the District Court they said:

> "There is no ambiguity there. The prohibition of action is broad, extending to any practice of conduct, including solicitation efforts by the merged company which would divert traffic of E-L or D&H from their lines." (R. 149)

Subsequently on oral argument before the Court below, counsel for Penn and Central described the Appendix G traffic conditions at some length (R. 2847-52). Referring on several occasions to the traffic conditions as a "status quo restriction", counsel said (R. 2850-51):

> "Listen to how broad it is and how restricted [sic] it is on this merged company.

D&H (a former president of New York Central) in Finance Docket No. 21510, that E-L would not 'be substantially and adversely affected immediately upon consummation of [the Penn-Central] merger' and that 'the effects would begin to be felt perhaps in the second year, and not in the first year.' "

The record clearly shows that the testimony in question related *only* to EL (R. 2917-19). Futhermore, testimony relating to the effect of the merger on D&H was that a substantial loss would begin to be felt almost immediately, amounting to a rate of more than $1,000,000 annually, over 2½% of D&H's gross, by the end of the first year and increasing after that (R. 343). See D&H's opening Brief (pp. 34-39).

The statement in the Brief of Connecticut, Massachusetts and Rhode Island (pp. 8-9) that D&H conceded that "some time must pass before the merger would have serious adverse effects on anyone" is not supported by any record reference.

"'We, the merged company, shall not publish or provide for any new or changed routing practice'—we can't change our routes—'and/or our freight rates'—we can't change our freight rates—'or service'—we can't change our service—'whether it is locally or jointly with other carriers which would divert or tend to divert traffic from the routes in which E-L, D&H and B&M now participate or participated at the time this merger application was filed,' and listen to this, 'or take any action or engage in any practice or conduct contrary to the purpose and general objects to this condition as explained in this report.'

"As it is explained in this report on page 532, the purpose of that condition is to maintain a status quo as between the competitive traffic, between those three lines and the Penn-Central."

And again (R. 2852):

"With this status quo order, it puts the indemnification provision in its proper light. I think this indemnification provision has been over-emphasized in these discussions, because the real prohibitive force of this Appendix G is this status quo provision that wouldn't let us do any act or have any practice that will divert or tend to divert traffic from these three lines and then the Commission puts in a procedure whereby it can be enforced against us."

And again (R. 2856):

"These traffic conditions are very broad and very restrictive on us and they will work.

"What the Commission had taken into consideration here, there may be acts other than these two merging railroads that could happen that would influence traffic away and basically the shipper having the right to route the traffic, the mere fact that we merge and be friendly, even though we perform no

act, it may be that it might influence some shipper to route traffic on our line that was not routed that way before. There is a possibility of an incidental damage not caused by my acts.

"My acts are prohibited. I cannot do anything that will divert that traffic."

And again (R. 2860-61):

"But the basic finding of the Commission was that, 'Unless they are protected, you have to wait two years to merge.'

"Now, what have they done? They have given them full protection in their interim period. They have prohibited us from doing any act to divert traffic and they have provided the machinery for us paying them damages if we injure them in any way.

"Judge Friendly: Do you construe the traffic conditions as preventing the merged company from using this solicitation force to get traffic routed over its lines rather than routing it over one of these three even if it doesn't do any of the things specifically named there?

"Mr. Gray: If it is traffic that they are handling and have been handling yes. We cannot do any act, take any action which would do it, and certainly that is an action.

"It goes further than that, your Honor. It stops us from improving our service. This is a terrific burden on the Penn-Central, this status quo provision, but it is a price that we agree we will assume for this temporary period while the problems of the D&H, B&M and Erie-Lackawanna are worked out. We think it is proper and we think it should be done without an interlocutory injunction where it can be done without them being hurt."

It is hard to conceive of a broader interpretation of the Appendix G traffic conditions than that set forth in the

Court below by counsel for the merging roads. And various appellees in their Briefs here continue to describe the conditions as "broad" and "extensive" (Penn and Central, pp. 41, 48) and "extremely severe" (State of New York, p. 27); and that "upon their face" they "afford significant protection" (Commission, p. 65).

However, a quite different construction was placed on these conditions by Penn's witness in the recent hearings before the Commission on these conditions which were concluded on December 16, 1966.* In the first place, the existence of a ban in Appendix G on solicitation by Penn-Central that would divert traffic from D&H and EL, which, as indicated above, was a matter of interest to Judge Friendly in the District Court, has been flatly rejected by the Penn witness, as shown in the excerpt of his testimony attached hereto as Appendix A.

Without describing in detail all the other departures from an interpretation of the traffic conditions as constituting a broad prohibition on any action that would divert D&H, EL or B&M traffic, it is enough to point out that the Penn witness has testified in the Commission hearings that in his opinion, there is no bar in Appendix G to any action of any character that Penn-Central might take if it is action which could have been taken absent merger by either Penn or Central. Thus, it is Penn's position, for example, that Penn-Central could under Appendix G take any action which it desired to improve Chicago-Boston service over the

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* After hearings on the capital loss indemnification issue, discussed *infra*, were concluded, there were nine days of hearing before the Commission on the matter of the traffic conditions and possible reinstatement of the revenue indemnity provision. Central, unlike Penn, introduced no testimony on the scope or meaning of the traffic conditions.

lines of the present Central (Tr. 22332),* despite the State of New York's position to the contrary (Brief, p. 25); it is Penn's position that Penn-Central could change any pre-existing joint rate of Penn and Central (though admitting it would be barred from making new joint rates) (Tr. 22331-32, 22341-42); it is Penn's position that Penn-Central could initiate or change any Penn-Lehigh Valley (a 90% owned subsidiary of Penn) or Central-LV cooperative arrangement (Tr. 22322)**; and it is Penn's position that Penn-Central could construct and use new facilities for improvement of service along the lines of either Penn or Central provided their use was restricted to either the Penn's lines or the Central's lines (Tr. 22342-44).***

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* "Tr." and "Ex. FH—" references herein are to the transcript of testimony or exhibits, respectively, in the further hearings before the Commission to consider the matters set forth in its September 16 Report and Order (B—42, 47).

** D&H's evidence in the further hearings before the Commission showed (Ex. FH—34, p. 3) that the LV interchange with D&H in 1965 totalled 60,546 loaded cars and that the Penn interchange with D&H in 1965 totalled 107,234 loaded cars. The interchange of D&H with the present Penn system including LV is more than the interchange of D&H with any other system except the B&M.

*** The record also shows (R. 2923) that Judge Friendly may have been of the view that subdivision B of section 1 of Appendix G concerning allocation of traffic would prevent diversion of such D&H business as shipments via Penn from Chicago to Albany, for example. D&H counsel there stated that it was not clear to him whether this applied to traffic routed by shippers (which forms the great preponderance of traffic, see D&H Brief, p. 35), or only to unrouted traffic. In the recent Commission hearings Penn's witness testified (Tr. 22306-09) (and D&H's witness agrees, Ex. FH—34, p. 4) that subdivision B applies only to unrouted traffic, and Penn's witness in his prepared statement suggested language to make this clear (Ex. FH—51, pp. 16-17). In other words, if a shipper were to route a Chicago-Albany shipment "Penn-Central" it would be routed solely over the lines of the merged system, regardless of the fact that prior to the merger shipments of that shipper had been routed "Penn-D&H". And, of course, Penn-Central's sales representatives would be vigorously soliciting shippers for routing via Penn-Central's long hauls.

Obviously this construction of the Appendix G traffic provisions would render them virtually nugatory. Had this construction been advanced below, it would seem most unlikely that the District Court would have concluded, as it did (A—28), that if the traffic conditions alone had been originally imposed by the Commission in its April 6 Report, they would have sufficed to prevent injunction of consummation of the merger. Certainly, we trust, the Court below would have had some hesitation in describing the conditions as having a "highly beneficial effect . . . which, on any view, will sharply reduce the loss" (A—30).

We of course do not admit that this new construction of Appendix G which has been offered by Penn's witness conforms to either the words of Appendix G or the Commission's intent expressed in its April 6 Report.* But it demonstrates beyond any doubt the crying need for Commission clarification of the Appendix G traffic conditions *before,* not after, the Penn-Central merger is consummated. Without such clarification, no one, we submit, may properly conclude that the conditions are adequate to provide even a small part of the necessary protection for D&H, EL or B&M against traffic diversion.

III

APPELLEES' BRIEFS FAIL TO SHOW A RATIONAL BASIS FOR OR ADEQUATE FINDINGS BY THE COMMISSION IN SUPPORT OF ITS DETERMINATION THAT THE MERGER SHOULD BE PERMITTED TO BE CONSUMMATED NOW RATHER THAN DELAYED

For the reasons set forth above, the Orders of the Commission do not conform to law because they have failed to

* Other than as to the ban on solicitation which D&H counsel indicated was not provided by Appendix G and probably could not be enforced even if it were (R. 1339).

include just and reasonable conditions which would make the merger consistent with the public interest. Remand is thus required. For these reasons, it is not really necessary to undertake assessment of the factors which were or should have been considered by the Commission, or the adequacy of its findings, in connection with its consideration in the September 16 Report of the issues discussed under the segment entitled "Time of Consummation" (B—13-16).

However, in view of the extensive briefing of this subject by appellees, we shall deal briefly with a few of the major considerations here.

Appellees claim that a risk exists that the merger will never take place if it is not allowed to take place now, and that this risk was properly taken into account and given substantial weight by the Commission in its determination that the merger should be authorized for immediate consummation rather than delayed. That there is *a* risk that delay of the merger for many years might possibly result in eventual abandonment of the merger is, we suppose, something that cannot be denied. For that matter, there is *a* risk that any merger, even if authorized to be consummated, will not take place at all—authorization to merge does not compel merger. But a contention that any substantial weight should be given to the "risk" that this merger, if delayed pending solution of the issues pressed on this appeal, will not occur because of possible future management decisions or changing circumstances which might make the stock exchange ratio unfair (*e.g.*, NH Brief, p. 42; Penn and Central Brief, pp. 60-61), is, we submit, untenable in view of the huge savings in operating costs that it is expected will be achieved by this merger. Penn's chief executive officer testified before the Commission in its further hearings on November 16, 1966 that he believed these savings will exceed the original estimate of $81,000,000 a year

(Tr. 20962). This figure, moreover, does not take into account improvements in traffic volume as a result of its substantially enhanced ability to compete with other modes of transportation as well as other railroads. See also in this connection EL's Brief (pp. 72-74).*

The principal concern that the merger may never occur rests on the assertion that it represents the only solution for NH other than its liquidation. Yet the inclusion of NH in Penn-Central, assuming consummation of the merger, is by no means itself assured, and in any event will take a considerable period of time to accomplish. (327 I. C. C. 475, 527; B—5) Immediate consummation of the merger, therefore, clearly is not required to "save" the New Haven.

Moreover, as pointed out in D&H's opening Brief (pp. 45-50), the Commission, in dealing in its September 16 Report with the question of time of consummation of the

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* The Commission's Brief (pp. 54-55) sets forth certain figures as to earnings of Penn and Central, on an actual and "pro forma" basis. These figures, it is to be noted, relate only to earnings of the individual Penn and Central companies and do not reflect the true basis on which earnings should be compared in connection with their relative values on merger, i.e., the "consolidated" basis which includes the earning power of each company through its numerous subsidiaries. While EL's Brief gives the actual earnings per share on the "consolidated" basis, it is appropriate in connection with the Commission's Brief to consider both the actual and "pro forma" figures on that basis, as set forth below. The source of these figures is the Central's proxy statement referred to in the Commission's Brief.

	Actual earnings per share		Pro forma for merged company	
	Penn	Central	1 share	1.3 shares
1961	$1.31	$(1.91)	$0.22	$0.29
1962	1.53	0.03	0.94	1.22
1963	2.35	2.11	2.07	2.69
1964	4.37	5.34	4.27	5.55
1965	5.06	7.64	5.38	6.99

As set forth in the proxy statement, the "pro forma" earnings do not take into account the anticipated savings to be realized from the merger.

merger, failed to make findings on a material issue, i.e., the extent of the consequences which Appendix G would have on the benefits it had found would result if the merger—not restricted by Appendix G conditions—were accomplished. It was noted both that there were no findings weighing the delay in accomplishment of significant benefits with Appendix G in effect against delay until inclusion of the three protected roads, and that there were no findings as to what merger benefits would flow in the meantime while Appendix G was still in effect.

No appellee's brief appears to deal with this issue directly except that of Penn and Central. Their effort (pp. 58-59) virtually admits the second half of D&H's contention and attempts to deal only with the first. It starts out by saying that the D&H argument ignores the fact that the Commission was concerned not with immediate but with ultimate consequences. Rather than ignoring this fact, D&H relied on it. As stated in D&H's Brief (pp. 48-49), for all that appears in the Commission's Report, denial of immediate consummation of the merger may cause no more delay of significant merger benefits to either the public or the merging railroads than would be encountered in operating under the restrictions of Appendix G, particularly if construed as broadly as Penn and Central contended in the District Court.

Penn and Central (Brief, p. 58) attempt to rationalize the Commission's conclusion to let the merger proceed by stating that what consummation will do is to permit Penn and Central to *begin* [their italics] the capital improvements program and otherwise take some of the steps necessary to accomplish the ultimate benefits of the merger. No doubt Penn-Central would "begin" to spend capital moneys if Penn's witness in the recent Commission hearings above mentioned is right in interpreting Appendix G as permit-

ting the making of all projected improvements so long as they do not involve construction employing the properties of both merging roads. But that interpretation, we believe, is manifestly not in accord with the Commission's intent and we would hope that the Commission's Appendix G will be clarified to prevent such an interpretation.

The Penn and Central argument furnishes an excellent illustration of the need for determination of the protective conditions before the merger is consummated and the need that they be set forth with clarity. As stated above, the Commission has improperly failed to weigh in any meaningful sense the effects on the merged company of its operating under Appendix G. The uncertainty as to the meaning of Appendix G created by the widely divergent views of their counsel and Penn's witness demonstrates that clarification is required before that weighing process can be undertaken.

IV

CONTENTION OF PENN AND CENTRAL THAT PROTECTED LINES SHOULD BE COMPELLED TO WITHSTAND LOSS IN CAPITAL VALUE CAUSED BY PENN-CENTRAL MERGER IS ERRONEOUS

The issue of capital loss indemnification is discussed at pages 27-30 of our opening Brief. That issue was required to be the first heard by the Commission in its recent hearings. Hearings thereon have been completed; the issue has been briefed and orally argued and is now before the Commission awaiting decision.

The possible significance of this issue has been highlighted by the Recommended Report in Finance Docket No. 21510 released on December 22, 1966 by Commissioner Webb who was the hearing officer in that proceeding. The

Brief of Penn and Central herein (p. 47) contends that inclusion of D&H, EL and B&M in N&W would not "be placed at hazard" if the Penn-Central merger went through without a provision for capital indemnity because the lines seeking inclusion may be required to bear the loss in their value which Penn-Central would cause. Flatly contrary to such contention, Commissioner Webb has said in his Report (p. 45) that if the Commission adopts the principle that a downward adjustment in terms is required on account of net traffic losses to a Penn-Central system, "it will not be possible, in the opinion of the Presiding Officer, to construct stock exchange ratios which are equitable to both N&W and to EL unless EL or N&W receives capital loss indemnification from Penn-Central. Inclusion of D&H is hereafter found to be dependent on inclusion of EL."

Stating that it "seems obvious" that the public interest would be "better served" by inclusion of D&H, EL and B&M in N&W than in Penn-Central (p. 31), Commissioner Webb also said:

> "[T]heir inclusion in the system chosen by the Commission in the furtherance of national transportation objectives should not be on terms which reflect any diminution of capital value attributable to the traffic diversion impact of the other system. In other words, the petitioners should not be penalized for anticipating the Commission's desire to preserve rail competition in the territory they serve." (p. 28)*

* Penn and Central in their Brief (p. 48 n.26), indicate the capital loss indemnity issue will become moot if Commissioner Webb's recommendation, that no downward adjustment in terms for inclusion of the three roads in N&W on account of Penn-Central traffic diversion should be made, prevails. This is true, and so would the whole appeal of D&H if it is included in N&W as Commissioner Webb recommends. The possibility of later mootness obviously cannot eliminate the necessity for deciding the questions raised in this case unless decision here is postponed until completion of the N&W inclusion proceedings.

V

CONTENTION OF STATE OF NEW YORK THAT THIS PROCEEDING RESULTS FROM THE FAILURE OF D&H TO MOVE FOR AND SECURE PROMPT INCLUSION IN THE N&W SYSTEM IS WITHOUT BASIS

At page 4 of its Brief the State of New York charges that the appeal of D&H "is the result of . . . the failure of E-L, D&H and B&M to move for and secure prompt inclusion in the N&W system". In this connection it asserts (Brief, p. 5) that D&H "belatedly" petitioned for inclusion in the N&W system after the hearings on the N&W-Nickel Plate merger phase of Finance Docket No. 21510 were closed in 1962, and that it was dilatory in seeking inclusion under the condition subsequent of Appendix "O" to the Report in the N&W-Nickel Plate case* (324 I. C. C. 1, 148).

That this contention has no substance in fact is clear from the record. This is emphasized by the finding of Commissioner Webb in the Recommended Report of December 22, 1966 in Finance Docket No. 21510, above quoted.

The record shows (R. 1558-62) that D&H has striven on a number of occasions to convince both the Commission and N&W that it should be included in the N&W system whether or not EL should be included at the same time. Nevertheless, D&H's first petition for inclusion, filed in 1962, as the State of New York says, after the N&W-Nickel Plate hearings were closed, rather than being filed too late, was actually found by the Commission to be premature because, it ruled, inclusion of D&H in the N&W system was necessarily dependent upon EL's becoming a party to the transaction.

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* NH (Brief, p. 20) seeks to imply the same contention.

As the Commission's decision in the N&W-Nickel Plate case makes clear (*id.* at 31-32), it was at D&H's urging that the Commission there imposed the condition subsequent in the N&W-Nickel Plate case authorizing the later filing by D&H and B&M, as well as EL, of petitions for inclusion in the N&W system. D&H's prompt efforts to secure inclusion in that system on a voluntary negotiated basis were rebuffed, again for lack of inclusion of EL (R. 1561). Now that D&H has petitioned for inclusion in N&W under the condition subsequent above referred to, it is once more met by a finding which appears in Commissioner Webb's Recommended Report in Finance Docket No. 21510 that its inclusion in N&W should be dependent on inclusion of EL.*

In the foregoing discussion we do not mean to imply to any extent whatsoever that EL has been in any sense dilatory in seeking inclusion in the N&W system under the condition imposed in the N&W-Nickel Plate case. On the contrary, the facts also show that EL petitioned thereunder as promptly as conditions would permit.**

It is indeed ironic that the State of New York should make the charge that D&H should have "moved for and secured" inclusion in the N&W system earlier. The State itself urged as recently as September 19, 1966, in its brief (p. 21) in Finance Docket No. 21510 that inclusion of D&H in the N&W system should be conditioned upon inclusion of EL.

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* The insistence to date on the part of both the Commission and N&W that EL be included as a condition to inclusion of D&H shows the error of NH's contentions (Brief, p. 19) as to the problems that exist in respect of D&H inclusion.

** See the discussion of the Examiners in their Recommended Report in this case, page 417, released but six months prior to EL's petition for inclusion in the N&W case, indicating the substantial obstacles to inclusion of EL in any system then and theretofore existing.

Conclusion

For the foregoing reasons, and for the reasons set forth in D&H's main Brief, the Court should reverse the Order of the District Court and remand this case as set forth in the main Brief.

Respectfully submitted,

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APPENDIX A

Excerpt from Pages 22327-22329 of Transcript of Further Hearings Before Interstate Commerce Commission in Finance Docket No. 21510, December 19, 1966, Henry W. Large, Vice President—Traffic, Pennsylvania Railroad Company, Witness

Q. I will now read to you from a memorandum submitted in the three-judge court on behalf of what were there called the intervening defendants, New York Central and Pennsylvania Railroad Company, from pages 14 and 15, and ask you whether you agree with that.

I will not read it all, because some of it is a quote from the Commission's decision.

"E-L and D&H claim that the requirement of the status quo provisions of Appendix G will be ineffective to maintain status quo as to their traffic relationship because—" and I am now skipping a bit— "iv. the merged company would solicit for its long haul to the detriment of D&H."

Then after referring to the provisions, it goes on to say: "There is no ambiguity there. The prohibition of action is broad, extending to any practice or conduct, including solicitation efforts by the merged company which would divert traffic of E-L or D&H from their lines."

Do you agree with that statement, Mr. Large? A. I agree that we are instructed to try and preserve the status quo of the traffic that the Erie, D&H and B&M are now enjoying.

Q. That means you may not solicit traffic against the D&H? A. No. We are soliciting traffic against the D&H now. We certainly are not going to—I don't consider that we should be restricted from soliciting traffic from the D&H. I think we are restricted from drastically improving the

service of the merged property that would tend to divert a substantial amount of business from the Erie or the D&H.

Q. So, so far as you are concerned, you would repudiate this statement if it means that the merged company may not solicit traffic against the D&H? A. I think we should be free to solicit traffic. We certainly aren't expected by the Commission to stand idly by while the D&H solicits all our business from us in connection with its——

Q. I am not arguing with you, but— A. I know, but there are two sides to the question.

Q. Therefore, I take it you consider yourself certainly free to solicit traffic in connection with the New Haven that might be competitive with D&H? A. The——

Q. Penn-Central system? A. In connection with one segment or the other of the line, so long as it doesn't disturb the overall traffic relationship; yes.